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Mahmod Yary Mohammad & Ors v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05(M)-45–01 OF 2017 (IRN), W-05(M)-47–01 OF 2017 (IRN) AND W-05(M)-49– 01 OF 2017 (IRN)

MOHTARUDIN BAKI, HARMINDAR SINGH AND YEOH WEE SIAM JJCA

23 JANUARY 2019

C

Criminal Law — Appeal — Appeal against conviction and sentence — Dangerous Drugs — Trafficking — Whether appellants had knowledge of drugs — Whether appellants had control and custody of drugs — Whether appellants had possession of drugs — Dangerous Drugs Act 1952 s 39B(1)(a)

D

Evidence — Admissibility — DNA sample — DNA sample not taken by police officer with rank of DSP — Whether DNA report rendered inadmissible — Deoxyribonucleic Acid (DNA) Identification Act 2009 ss 12 & 13

E

This was an appeal against the decision of the learned High Court judge who convicted the three appellants, who were Iranian nationals, for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The case for the prosecution was that, based on information received regarding and allegedly processing and trafficking of a dangerous drug involving a syndicate run by three Iranian nationals at the house where the appellants were arrested in ('the said house'). The police had proceeded to the said house for a preliminary observation. A 24 hour surveillance was conducted, one was placed at the adjacent building's water reservoir tank located within 500 meters from the said house using binoculars for the purpose to monitor movements of individuals as well as vehicles and another was conducted at the gate of the guard post to record the movements of a white Proton Persona car with registration No WWB 1217 ('the said car'), which was allegedly driven by members of the syndicate. With the information derived from the surveillance, the police decided to proceed to effect the arrest of the persons in the said house. The action by the police resulted in the arrest of the appellants. After the arrest of the appellants, PW8 together with his team found incriminating substances suspected to be illicit drugs as well as equipment to process the same. All the exhibits that were found were seized and analysis of the chemist confirmed that the exhibits seized contained methamphetamine with a total net weight of 15,821g. Apart from the exhibits seized, there was also scientific evidence being: (a) DNA evidence as testified by SP3; and (b) fingerprint evidence adduced by SP18. The pivotal issue raised in the appeal was in relation to the possession and knowledge of the impugned drugs. All three appellants

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denied knowledge and possession. The third appellant also raised the issue of the admissibility of the DNA evidence as under ss 12 and 13 of the Deoxyribonucleic Acid (DNA) Identification Act 2009 ('the DNA Act 2009'), a blood sample, as an intimate sample, was to be taken by a deputy superintendent of police (DSP). In the present case, it was SP21 who had authorised for the blood specimen to be taken and he did not hold the rank of DSP. It was submitted that the DNA report was inadmissible as conditions stated in s 12 of the the DNA Act 2009 was not complied with.

Held, allowing the appeal of the first appellant and ordering for his acquittal and discharge, dismissing the second and third appellants' appeal and affirming their conviction and sentences:

(1) The learned trial judge ruled that the first appellant had custody and control based on two factors namely: (a) the first appellant was seem 'meniti bumbung rumah No 9'; and (b) 'sering datang dan pergi serta berada di rumah No 9 untuk tempoh yang agak panjang menunjukan tertuduh pertama mempunyai jagaan dan kawalan bersama serta mempunyai akses terhadap rumah No 9 dan barang kes dadah yang berada di dalam rumah tersebut'. The first finding was based entirely on SP8's testimony. The second finding was not supported by the evidence. The only evidence against the first appellant with regard to his presence in house No 9 was the fact that the first appellant drove the same Proton Persona to house No 9 and at around 4.52pm and eight minutes later, the raid took place where the first appellant was apprehended. The first appellant could only have been in the said house for a few minutes. This was insufficient to establish custody and control and therefore possession. The mere presence of the first appellant at the scene for a few minutes or even proximity to the drugs admits to more than the inference suggested by the prosecution that he could also have no knowledge or custody or control of the impugned drugs. So in all probability, he could have been at the scene, as he says, merely to deliver food and was not in possession of any drugs (see paras 20–23 & 26).

(2) The only plausible evidence left against the first appellant was that he together with the second and third appellants attempted to flee from the said premises to escape the police. In the absence of any reasonable explanation, the evidence of fleeing may only indicate knowledge alone but without proof of physical custody or control was insufficient in law to constitute possession, much less trafficking. A person may have knowledge of the incriminating drugs but it was also possible for him or her at the same time not to have custody or control in the same sense that some other person may have the power of disposal of the drugs. That person with knowledge could not then in law be said to be in possession of the drugs (see paras 27–29).

(3) In relation to the second and third appellant, it was a fair inference that they must have had knowledge of the drugs when they fled from the house to evade arrest. There was also fingerprint evidence that SP22 and her team had lifted fingerprints from six 'bikar kaca' and both their fingerprints could be found on at least five out of the same six and not all six. It was also confirmed that the DNA profile of both the second and third appellants was found on the two shavers that were recovered from a bathroom located in room No 3 on the fourth floor of the said house. The scientific evidence confirmed that they had been, at the very least up to the fourth floor of the said house (see paras 36–37).

(4) If the second and third appellants were indeed innocent as they claimed, they would have told the police about Mehdi at the first opportunity, unless of course they, together with Mehdi, were all involved with the illicit drugs. Considering the entirety of the evidence the irresistible inference was that the second and third appellants were culpable and their explanation for their innocent presence at the scene of the crime was rather farfetched and highly improbable as the learned judge had found (see paras 43–44).

(5) The court had not overlooked the fact that this was not the usual type of trafficking as it involved the manufacturing of drugs. The discovery of the various apparatus and laboratory equipment and the chemical substances in the house coupled with the chemist's evidence as to the uses and functions of those apparatus and substances found lend to much credence to the proposition of the prosecution that the said house was used as a clandestine drug laboratory. The overwhelming inference was that the second and third appellants could not have no knowledge of what was transpiring in the said house given the evidence that was adduced against them. As alluded to earlier, the fingerprint and DNA evidence placed them up to the fourth floor of the said house where the incriminating drugs were found by the police party (see paras 46–47).

(6) Sections 12 and 13 of the DNA Act 2009 were procedural and not related to the issue of admissibility of such evidence. It was trite law that the court would admit evidence if it was relevant and reliable. Even blood samples taken illegally from suspects or accussed persons without their consent had been held to be admissible (see para 49).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Hakim Mahkamah Tinggi yang terpelajar yang menyabitkan ketiga-tiga perayu, yang merupakan warganegara Iran, untuk satu kesalahan dibawah s 39B(1)(a) di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut'). Kes pendakwaan adalah, berdasarkan maklumat yang diterima berkenaan dengan maklumat yang diterima mengenai sindiket mengedar dan memproses dadah yang dijalankan oleh tiga

warganegara Iran di rumah yang mana tertuduh telah ditangkap ('rumah tersebut'). Pihak polis telah pergi ke rumah tersebut untuk pemerhatian awal. Pemerhatian 24 jam dijalankan, satu diletakkan di tangki takungan air di bangunan berhadapan yang berada dalam lingkungan 500 meter dari rumah tersebut menggunakan teropong untuk tujuan memerhatikan pergerakan individu dan kenderaan manakala satu lagi dilakukan di pagar pos pengawal untuk merakan pergerakkan satu kereta Proton Persona berwarna putih dengan nombor pendaftaran WWB 1217 ('kereta tersebut'), yang kononnya dipandu oleh ahli-ahli sindiket tersebut. Dengan maklumat yang diperoleh daripada pemerhatian tersebut, pihak polis membuat keputusan untuk menangkap individu-individu yang berada di rumah tersebut. Tindakan pihak polis ini menyebabkan penahan perayu-perayu. Selepas penangkapan perayu-perayu, PW8 bersama-sama pasukkannya menjumpai bahan-bahan salah yang disyakki merupakan dadah terlarang dan juga peralatan untuk memproses yang sama. Kesemua eksibit yang ditemui telah dirampas dan analisa ahli kimia mengesahkan bahawa ekshibit-ekshibit yang dirampas mengandungi methamphetamine dengan berat bersih 15,821g. Selain daripada ekshibit-ekshibit yang dirampas, juga wujud keterangan saintifik iaitu: (a) Keterangan DNA sepertimana keterangan SP3; dan (b) keterangan cap jari yang dikemukakan oleh SP18. Isu utama yang dibangkitkan dalam rayuan adalah berkenaan dengan milikan dan pengetahuan dadah tersebut. Kesemua perayu menafikan pengetahuan dan milikan. Perayu ketiga turut membangkitkan isu kebolehterimapakaian keterangan DNA sepertimana dibawah ss 12 dan 13 Akta Identifikasi Asid Deoksiribonukleik (DNA) 2009 ('Akta DNA 2009'), satu sampel darah, sebagai satu sampel intim, hendaklah diambil oleh seorang timbalan superintenden polis (DSP). Dalam kes in, SP21 yang membernahkan agar spesimen darah di ambil dan dia tidak memegang pangkat DSP. Adalah dihujahkan bahawa laporan DNA tersebut tidak boleh diterimapakai kerana syarat-syarat yang dinyatakan dalam s 12 Akta DNA 2009 tidak dipatuhi.

Diputuskan, membenarkan rayuan perayu pertama dan memeritahkan pelepasan dan pembebasan, mengetepikan rayuan perayu kedua dan ketiga dan mengesahkan sabitan dan hukuman mereka:

(1) Hakim bicara terpelajar memutuskan bahawa perayu pertama mempunyai kawalan dan milikan berdasarkan dua faktor iaitu: (a) 'perayu pertama dilihat meniti bumbung rumah No 9'; dan (b) 'sering datang dan pergi serta berada di rumah No 9 untuk tempoh yang agak panjang menunjukan tertuduh pertama mempunyai jagaan dan kawalan bersama serta mempunyai akses terhadap rumah No 9 dan barang kes dadah yang berada di dalam rumah tersebut'. Dapatan pertama adalah berdasarkan keterangan SP8 sepenuhnya. Dapatan kedua tidak disokong oleh keterangan. Satu-satunya keterangan terhadap perayu pertama adalah berkenaan dengan kehadirannya di rumah No 9 adalah fakta yang

A mana perayu pertama memandu kereta Proton Persona tersebut ke rumah No 9 dan lebih kurang jam 4.52 pm dan lapan minit kemudian, serbuan berlaku yang mana perayu pertama telah ditangkap. Perayu pertama hanya dilihat berada di dalam rumah tersebut untuk beberapa minit. Ini tidak mencukupi untuk membuktikan kawalan dan milikan. B Kehadiran semata-mata perayu pertama di tempat kejadian selama beberapa minit mahupun dekatnya dengan dadah merupakan lebih daripada inferens yang dicadangkan oleh pendakwaan bahawa dia mungkin juga tidak mempunyai pengetahuan atau milikan atau kawalan dadah tersebut. Jadi, dalam semua kebarangkalian, dia boleh berada di C tempat kejadian, seperti mana yang dinyatakannya, untuk menghantar makanan dan tidak mempunyai milikan apa-apa dadah (lihat perenggan 20–23 & 26).

(2) Satu-satunya keterangan yang tinggal terhadap perayu pertama adalah D bahawa dia bersama-sama perayu kedua dan ketiga cuba untuk melarikan diri daripada permis tersebut untuk melarikan diri daripada pihak polis. Dalam ketiadaan apa-apa penerangan yang munasabah, keterangan melarikan diri hanya boleh menunjukan pengetahuan dan tanpa apa-apa bukti milikan fizikal atau kawalan, adalah tidak E mencukupi di sisi undang-undang, untuk membuktikan milikan, apatah lagi pengedaran. Seorang boleh mempunyai pengetahuan menegenai dadah tersebut akan tetapi ianya juga berkebarangkalian untuknya pada waktu yang sama tidak mempunyai milikan dan kawalan dalam makna yang sama seperti satu prang lain yang mempunyai kuasa untuk F melupuskan dadah tersebut. Individu yang mempunyai pengetahuan terebut tidak boleh dikatakan di sisi undang-undang mempunyai milikan terhadap dadah tersebut (lihat perenggan 27–29).

(3) Berkenaan dengan perayu kedua dan ketiga, adalah merupakan inferens G yang munasabah bahawa mereka semestinya mempunyai pengetahuan dadah tersebut apabila mereka melarikan diri dari rumah tersebut untuk mengelak ditangkap. Juga wujud keterangan cap jari yang SP22 dan pasukkannya telah kesan cap jari dari enam bikar kaca dan cap jari mereka berdua boleh ditemui di sekurang-kurangnya lima dari enam H bikar kaca tersebut dan bukannya keenam-enam. Adalah juga disahkan bahawa profil DNA perayu kedua dan ketiga ditemui pada kedua-dua pencukur yang ditemui di bilik air yang berada di bilik No 3 di tingkat empat rumah tersebut. Keterangan saintifik mengesahkan bahawa mereka pernah berada, sekurang-kurangnya ke tingkat empat rumah I tersebut (lihat perenggan 36–37).

(4) Sekiranya tertuduh kedua dan ketiga sememangnya tidak bersalah seperti mana mereka nyatakan, mereka akan memaklumkan kepada pihak polis berkenaan dengan Mehdi sewaktu peluang pertama, kecuali mereka, bersama-sama dengan Mehdi, terlibat dengan dadah yang salah itu.

Mengambilkira keseluruhan keterangan dan inferens iaitu perayu kedua dan ketiga adalah bersalah dan penerangan mereka untuk kehadiran tidak bersalah mereka di tempat kejadian adalah tidak masuk akal dan tidak munasabah seperti mana dapat hakim bicara (lihat perenggan 43–44).

(5) Mahkamah tidak terlepas pandang fakta yang ini tidak merupakan kes pengedaran yang biasa kerana ianya melibatkan manufaktur dadah. Penemuan pelbagai perkakas dan peralatan makmal dan bahan kimia di dalam rumah tersebut berserta dengan keterangan ahli kimia mengenai kegunaan dan fungsi peralatan dan bahan kimia yang ditemui tersebut membuktikan pengataan pendakwaan yang rumah tersebut digunakan sebagai makmal dadah rahsia. Inferens yang boleh dibuat adalah mustahil perayu kedua dan ketiga tiada pengetahuan apa yang berlalu dalam rumah tersebut mengambilkira keterangan yang dikemukakan terhadap mereka. Seperti mana nyatakan terdahulu, keterangan cap jari dan DNA meletakkan mereka di tingkat empat rumah tersebut apabila dadah salah ditemui oleh pasukkan polis (lihat perenggan 46–47).

(6) Seksyen 12 dan 13 Akta DNA 2009 adalah prosedural dan tidak berkaitan dengan isu kebolehterimapakaian keterangan sedemikian rupa. Adalah menjadi undang-undang mantap bahawa mahkamah akan menerima keterangan sekiranya ianya relevan dan boleh dipercayai. Jikalau sampel darah tersebut diambil secara salah daripada saspek atau tertuduh tanpa keizinan mereka telah diputuskan sebagai boleh diterima pakai (lihat perenggan 49).]

Notes

For a case on DNA sample, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 107.

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Asdanusi Daut & Anor v PP [2004] 3 CLJ 669, CA (refd)

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)

Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134, CA (refd)

Ibrahim Mohamad & Anor v PP and another appeal [2018] Supp MLJ 280; [2011] 4 CLJ 113, FC (refd)

Kuruma, Son of Kaniu v The Queen [1955] AC 197, PC (refd)

Ramli bin Kechik v PP [1986] 2 MLJ 33, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)
Deoxyribonucleic Acid (DNA) Identification Act 2009 ss 12, 13
Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45A-27–08 of 2012 (High Court, Kuala Lumpur)

Kamarul Hisham (Tiara Katrina Fuad with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the first appellant.
Geethan Ram Vincent (Aliff Bolkin with him) (Geethan Ram) for the second appellant.
Kitson Foong (Jodia Poh Yi Tying with him) (Kit & Assoc) for the third appellant.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] The appellants are Iranian nationals. They were jointly charged in the High Court at Kuala Lumpur for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge, as was later amended, reads as follows:

> Bahawa kamu bersama-sama pada 11/2/2012 jam lebih kurang 5.00 petang di seunit rumah No 9, Jalan Dutamas Melor 1, Changkat Kiara Bayu Off Jalan Dutamas, dalam daerah Sentul, dalam Bandaraya Kuala Lumpur, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 15,821 gram. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama serta dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[2] After a trial involving a total of 28 witnesses for the prosecution and the defence, all three appellants were found guilty of the offence as stated in the charge. They were accordingly convicted and sentenced to death by the High Court on 11 January 2017. The appellants then each filed these appeals. The first, second and third appellants in these appeals were the first, second and the third accused at the trial.

[3] The appeals were heard together on 20 July 2018 and 2 August 2018 and adjourned to a date for decision. On 27 August 2018, when the appeals were called up for decision, we unanimously allowed the appeal of the first appellant. We set aside the conviction and sentence passed by the High Court and substituted in its place an order for acquittal and discharge. The appeals by the second and third appellants were dismissed and the order of conviction and sentence against them was upheld. Our reasons for our decision now follow.

This will form the judgment of the court.

THE CASE FOR THE PROSECUTION

[4] The prosecution called 22 witnesses. The facts leading to the arrest of the appellants were set out in the judgment of the learned judge and in the submissions of the learned DPP and counsel for the appellants. The case of the prosecution as revealed by the evidence was as follows.

[5] Acting on information received on 5 February 2012 about an alleged processing and trafficking of a dangerous drug involving a syndicate run by three Iranian citizens at a residence at No 9, Jalan Dutamas Melor 1, Changkat Kiara Bayu, 50480 Kuala Lumpur ('the said house'), ASP Didi Fairuz bin Zainal Abidin (SP8), together with his team of officers from the Narcotics Unit of Bukit Aman, proceeded to the said house for a preliminary observation.

[6] Subsequently, SP8 assigned several officers in his team to conduct a 24 hours surveillance on the said house beginning from 6 February 2012 until the day the raid on the said house took place on 11 February 2012 ('the said surveillance'). The said surveillance was conducted in two ways. First, the surveillance took place from the adjacent Prima Duta Condo's water reservoir tank located within 500 meters from the said house. The surveillance was conducted through the use or binoculars to monitor movements by individuals as well as vehicles going in and out of the said house.

[7] The second surveillance was conducted at the gate of the guard post for the purpose of recording movements of a white Proton Persona car with registration No WWB 1217 ('the said car'). The said car was allegedly driven by members of the syndicate. Evidence in relation to the said surveillance was summarised by the learned judge in the judgment as follows:

(a) Pada 6.2.2012 jam lebih kurang 4.00 petang, Detektif L/Kpl Shazali bin Zakaria (SP12) melihat kereta Persona tersebut berhenti di hadapan rumah No.9 tersebut dan melihat 2 lelaki membawa satu beg plastik masuk ke dalam rumah No 9 tersebut dan kereta Persona tersebut terus beredar.

(b) Pada 7.2.2012 jam 11.30 pagi, Detektif L/Kpl Mohd Akmal bin Hassan (SP13) melihat satu lelaki keluar dari rumah No 9 tersebut dan telah pergi ke kereta Persona tersebut. Pada hari yang sama, Detektif L/Kpl Mohd Syaifulnizam bin Hairudin (SP14) melihat kereta Persona tersebut berhenti di hadapan rumah No 9 tersebut dan melihat dua lelaki berbaju biru keluar dari kereta dan masuk ke dalam rumah. Salah satu lelaki membawa satu beg plastik sampah berwarna hitam. Tidak lama kemudian satu lelaki keluar dari dalam rumah dan masuk ke dalam kereta dan terus beredar.

(c) Pada 8.2.2012 tiada sebarang pergerakan.

(d) Pada 9.2.2012 pemantauan dan pemerhatian dari pintu pagar keselamatan baru dimulakan melalui keterangan saksi-saksi SP14, Detektif S/M Muhamad Ramii bin Salleh (SP11) dan Detektif L/Kpl Mazwan bin Ishak (SP10) menunjukkan pada 9.2.2012 jam lebih kurang 2.25 petang kereta Persona tersebut yang dipandu oleh satu lelaki masuk dan berhenti di tempat letak kereta rumah No 9 tersebut, keluar satu lelaki dan telah mengeluarkan satu kotak dari boot belakang kereta Persona tersebut dan menyerahkan kotak tersebut kepada satu lelaki yang muncul dari dalam rumah No 9 tersebut. Lelaki yang sama kemudiannya mengambil satu lagi kotak dari tempat duduk belakang dalam kereta Persona tersebut dan membawa masuk ke dalam rumah No 9 tersebut. Pada jam 5.00 petang satu lelaki keluar dari rumah No 9 tersebut telah memandu kereta Persona tersebut dan beredar dari rumah No 9 tersebut.

Pada jam 7.42 malam kereta Persona tersebut dipandu oleh satu lelaki masuk semula dan berhenti di hadapan rumah No 9 tersebut dan pemandu kereta telah membawa keluar satu beg plastik hitam masuk ke dalam rumah No 9 tersebut.

Pada jam 9.53 malam kelihatan satu lelaki memakai seluar pendek tanpa memakai baju keluar dari rumah No 9 tersebut dan kemudian masuk semula ke dalam rumah No 9 tersebut.

Pada jam 9.55 malam kelihatan dua lelaki memakai seluar pendek tanpa memakai baju berjalan berlegar-legar di dalam rumah dan ada kalanya dilihat memegang beg plastik di tangan kanan dan tangan kiri sedang membuat sesuatu.

Pada jam 10.35 malam kelihatan satu lelaki berseluar pendak tanpa memakai baju sedang mengangkat satu tong gas di dalam rumah No 9 tersebut.

Pada jam 11.35 malam kelihatan satu lelaki memakai seluar panjang dan berbaju putih keluar dari rumah No 9 tersebut dan masuk ke dalam kereta Persona tersebut dan beredar dari rumah No 9 tersebut. Pada 11.37 malam kereta Persona tersebut melepasi keluar dari pintu pagar keselamatan.

(e) Pada 10.2.2012 jam 12.05 tengah malam kereta Persona tersebut masuk melalui pintu pagar keselamatan dan berhenti di porch rumah No 9. Kereta dipandu oleh satu lelaki. Satu lelaki keluar dari kereta membawa satu beg plastik masuk ke dalam rumah No 9. Satu lelaki berseluar pendek tanpa memakai baju keluar dari dalam rumah No 9 dan masuk semula ke dalam rumah No 9 bersama pemandu kereta Persona tersebut. Pada jam 1.15 pagi kelihatan satu lelaki membawa satu beg plastik dan satu lagi lelaki memakai baju singlet membawa satu kotak keluar dari dalam rumah No 9 dan masuk ke dalam kereta Persona tersebut. Satu lelaki terus memandu kereta beredar dari rumah No 9 dan lelaki yang memakai singlet masuk semula ke dalam rumah No 9 tersebut.

Pada jam 7.17 petang kereta Persona tersebut masuk ke kawasan perumahan dan berhenti di hadapan rumah No 9 dipandu oleh satu lelaki. Dua lelaki kemudian keluar dari dalam rumah No 9 dan masuk ke dalam kereta Persona tersebut dan beredar dari situ. Pada jam 8.18 malam kereta Persona tersebut masuk semula ke kawasan perumahan itu dinaiki oleh 3 lelaki dan kereta berhenti di hadapan rumah No 9. Kelihatan 3 lelaki keluar dari kereta, masing-masing menjinjit satu beg plastik terus masuk ke dalam rumah No 9 tersebut.

Pada jam 8.36 malam satu lelaki keluar dari rumah No 9 terus masuk ke dalam kereta Persona tersebut dan beredar dari situ.

(f) Pada 11.2.2012 jam 4.50 petang kereta Persona tersebut masuk melalui pintu pagar keselamatan dan berhenti di hadapan rumah No 9. Satu lelaki memakai seluar panjang dan baju putih keluar dari kereta dan satu lelaki berseluar pendek tanpa memakai baju muncul di pintu rumah No 9 dan dua lelaki tersebut terus masuk ke dalam rumah No 9 tersebut. Pemandu kereta Persona tersebut tidak dilihat membawa apa-apa barang.

Pada jam 5.00 petang, pasukan serbuan yang diketuai oleh SP8 terus membuat kepungan dan serbuan ke atas rumah No 9 tersebut setelah mendapat maklumat daripada anggota yang membuat pemerhatian bahawa kereta Persona tersebut telah berhenti di hadapan rumah No 9 tersebut.

[8] With the information derived from the surveillance, the police decided to proceed to effect the arrest of the persons in the said premises. The action by the police resulted in the arrest of the three appellants. The sequence of events was described by SP8. After entering the said house by breaking the front door using a door buster, SP8 immediately headed to the top floor of the said house. He headed to the balcony of the said house after noticing some movement of the curtains there.

[9] What transpired next was described by the learned judge in the judgment as follows:

[10] Setelah berjaya masuk ke dalam rumah, SP8 terus berlari ke tingkat paling atas rumah No 9 tersebut. Seteiah tiba di tingkat paling atas, SP8 dapat melihat langsir di balkoni rumah itu seperti bergerak. SP8 terus menuju ke balkoni tersebut dan SP8 dapat melihat tiga lelaki sedang berjalan meniti bumbung rumah No 9 tersebut menuju ke arah bumbung rumah sebelah (rumah No 11) dalam keadaan sebaris. Di hadapan sekali adalah lelaki yang memakai baju putih dan berseluar jeans panjang dan diekori oleh 2 lelaki yang memakai seluar pendek dengan tanpa memakai baju. Melihat keadaan itu, SP8 telah mengarahkan anggota pasukan serbuan melalui alat walkie talkie untuk membuat kepungan dan tangkapan terhadap tiga lelaki yang beliau nampak lari dari rumah No 9 melalui balkoni dan bumbung rumah No 9 tersebut.

[11] Setelah menerima arahan dari SP8 melalui walkie talkie, Detektif SM Mohd Mashud bin Hj Sahid (SP15) terus bertindak pergi ke bahagian belakang rumah No 11. Di sana SP15 melihat dua lelaki sedang bersembunyi di bawah satu meja. SP15 terus membuat tangkapan terhadap kedua-dua lelaki tersebut. Seorang daripada lelaki itu hanya memakai seluar pendek jenama 'Adidas' tanpa memakai baju. Lelaki ini dicamkan oleh SP15 sebagai tertuduh ketiga. Masa ditangkap, tertuduh ketiga mengalami kecederaan di bawah ketiak. Manakala tangkapan kedua tidak mengalami apa-apa kecederaan, memakai seluar panjang dan berbaju putih dicamkan oleh SP15 sebagai tertuduh pertama. Kedua-dua tertuduh kemudian dibawa ke hadapan rumah No 9 tersebut dan diserahkan kepada SP8.

[12] Semasa serbuan dilakukan, SP8 telah mengarahkan Detektif L/Kpl Abdullah bin Hamzah (SP16) dan Konst Mohd Riduan bin Ahmad untuk membuat kawalan di kawasan pondok pengawai di laluan masuk ke kawasan perumahan rumah No 9 tersebut. Semasa menjalankan tugas di pondok pengawal, Konst Mohd Riduan bin

Ahmad melihat ada seorang lelaki yang disyaki telah lari masuk ke dalam kawasan pagar rumah No 1 yang berada di hadapan pondok pengawal tersebut. Seterusnya SP16 dan Konst Mohd Riduan bin Ahmad telah berjaya menangkap saspek tersebut yang kemudiannya dicamkan sebagai tertuduh kedua. Tertuduh kedua dibawa ke rumah No 9 dan diserahkan kepada SP8. Pada masa tangkapan, tertuduh kedua hanya memakai seluar pendek jenama 'Nike' tanpa memakai baju dan dalam keadaan mendapat kecederaan di kaki.

[10] After the arr est of the appellants, SP8 conducted a thorough inspection of the said house. He and his team found incriminating substances suspected to be illicit drugs as well as equipment to process the same. A forensic team led by ASP Rohasmawati bt Abd Rahman (SP22) carried out a detailed examination of all the items found. All exhibits found were seized and handed over to the investigating officer, Insp Kumbat ak Tan (SP21).

[11] The exhibits suspected to contain illicit drugs were later handed over by SP21 to the chemist, Mr Zulkefli bin Mohd Edin (SP4) for analysis. Based on the chemist report (P101), it was found that the exhibits seized from the said house contained methamphetamine with a total net weight of 15,821g, which formed the subject matter of the charge.

[12] Apart from the exhibits seized from the said house, there was also scientific evidence adduced at the trial. The first piece of such evidence was the DNA evidence as testified by SP3. The learned judge related this part of the evidence as follows:

[21] Pihak pendakwaan turut mengemukakan keterangan saintifik melalui SP3 dan SP18. Saksi SP3, Puan Revathi a/p Perumal, Pegawai Sains Forensik dalam keterangannya menyatakan bahawa beliau telah menerima sebanyak 12 sampel barang kes untuk dijalankan analisis DNA antaranya 2 pencukur bertanda '4(b)' (P19B) dan bertanda '5' (P20A). Menurut keterangan SP22, P19B telah diambil dari dalam bilik mandi yang terdapat di bilik No 3, Tingkat 4 rumah No 9 tersebut. Menurut keterangan SP3, setelah analisis DNA dijalankan, P19B mempunyai kesan DNA tertuduh ketiga dan P20A disahkan oleh SP3 mempunyai kesan DNA tertuduh kedua.

[13] The next piece of scientific evidence was the fingerprint evidence adduced by SP18. The result of this part of the investigation was also considered by the learned judge as follows:

[22] Saksi SP18, Puwira Jaya bin Othman, Penolong Pendaftar, Pusat Pendaftaran Jenayah PDRM Bukit Aman pula dalam keterangannya menyatakan bahawa beliau telah menjalankan pemeriksaan dan penganalisaan kesan cap jari pada kad *lifting* yang bertanda '6(1)' hingga '6(6)' yang diperolehi pada bikar-bikar kaca yang bertanda 'C12' (P54B), 'C10' (P53B), 'C16' (P56A), 'C13' (P54C), 'C14' (P55A) dan 'C18' (P57) yang turut dirampas oleh SP8 dari dalam rumah No 9 tersebut. Setelah membuat perbandingan dengan contoh-contoh cap jari tertuduh-tertuduh

dalam Borang Cap Jari RJ 2C, SP18 mengesahkan terdapat kesan-kesan cap jari tertuduh kedua dan tertuduh ketiga pada kesemua 6 buah bikar kaca tersebut.

[14] At the end of the prosecution case, the learned trial judge found that a prima facie case had been established by the prosecution. The learned judge found that based on the evidence by the raiding team and the presence of the DNA evidence and the fingerprints of the second and third appellants, a reasonable inference could be made that the appellants had knowledge of the impugned drugs as well as the common intention of possession of the drugs as stated in the charge. For the element of trafficking, the learned judge invoked the presumption of trafficking under s 37(da) of the Act after taking into account the weight of the drugs seized.

[15] It would therefore appear, as found by the learned judge, that the prosecution had proved possession by way of inferences from direct evidence and the element of trafficking by resort to the presumption as mentioned earlier. The appellants were then ordered to enter their defence on the charge.

THE DEFENCE CASE

[16] The three appellants all chose to give evidence on oath. Three other witnesses were also called to support the defence of the appellants. The evidence of the first appellant was summarised by the learned trial judge as follows:

> [43] Dalam keterangan membela dirinya, tertuduh pertama (SD1) menyatakan dia berasal dari Iran. Beliau bekerja sebagai Jurulatih Gusti dengan pendapatan yang tidak memadai. Oleh itu beliau telah datang ke Malaysia dalam bulan Ogos 2011 untuk mencari pekerjaan bagi memperolehi pendapatan yang lebih. Beliau telah mendapat pekerjaan disebuah Kelab yang dimiliki oleh seorang warga Iran bernama Majid. Beliau memperolehi pekerjaan di Kelab itu melaiui seorang kawan bernama Jaafar. Kelab itu diberi nama 1001 Nights Restaurant & Club. Beliau dibayar gaji RM3,000 dan elaun RM600 sebulan sebagai penghantar makanan (*delivery man*). Selain itu beliau juga dibayar 'tips' oleh pelanggan. Beliau dan dua rakan telah menyewa sebuah rumah di No 6-5-3, Sutramas Condominium, Jalan Dutamas Raya, Segambut dan membayar sewaan RM850 sebulan termasuk utiliti. Sewaan bulanan kondo itu ialah RM2,500 sebulan.
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> [44] Tertuduh pertama menyatakan beliau bekerja dengan Kelab itu sehingga tarikh dia ditangkap. Kelab itu beroperasi di Pan Pacific Hotel berdekatan dengan Bangunan PWTC. Selepas ditangkap, beliau telah dimaklumkan bahawa Kelab itu telah berpindah ke No 2, Jalan Solaris, Solaris Mont Kiara. Sekarang operasi Kelab itu telahpun ditutup.
>
> [45] Pada masa beliau bekerja dengan Kelab tersebut, terdapat dua lagi pekerja iaitu Ahmed dan Mohamed yang bertugas sebagai 'waiter' dan 'delivery boy'. Waktu tugas beliau diantara jam 12.00 tengah malam hingga jam 4.00 pagi. Tugas beliau untuk menghantar makanan yang dipesan oleh pelanggan ke tempat yang diminta

oleh pelanggan. Beliau menggunakan kereta Proton Persona WWB 1217 dalam menjalankan tugas penghantaran makanan kepada pelanggan.

[46] Semasa bekerja dengan Kelab tersebut, beliau mengenali dua orang pelanggan tetap yang bernama Karim Faramarz Amiri dan Amir Mohamad Ghareh. Amiri berniaga menjual karpet manakala Karim berniaga pakaian wanita di Ampang Point.

[47] Pada 11.2.2012 taukeh beliau, Mr Majid telah meminta beliau untuk menghantar makanan yang telah dipesan oleh Mehdi ke rumah No 9, Jalan Dutamas Melor 1, Cangkat Kiara Bayu, Off Jalan Dutamas. Mehdi juga pelanggan tetap Kelab tempat beliau bekerja. Sebelum hari itu, beliau pernah dua kali menghantar makanan ke rumah No 9 tersebut. Pada hari itu, semasa beliau mahu beredar dari rumah selepas menghantar makanan, beliau telah ditangkap oleh pihak polis. Beliau menafikan telah ditangkap bersama tertuduh ketiga di bawah meja di belakang rumah No 11. Beliau tidak mengenali tertuduh kedua dan tertuduh ketiga tetapi beliau ada melihat mereka di tempat beliau bekerja pada malam sehari sebelum beliau ditangkap.

[48] Semasa menyerahkan makanan kepada Mehdi, dia tidak melihat tertuduh kedua dan tertuduh ketiga berada dalam rumah No 9. Beliau hanya melihat Mehdi bersama-sama dengan beberapa orang yang lain di dalam rumah itu. Dalam dua kejadian sebelum ini dimana beliau menghantar makanan ke rumah No 9 hanya Mehdi dan beberapa orang lain sahaja berada di rumah itu. Didalam kedua-dua penghantaran itupun dia tidak pernah melihat tertuduh kedua dan tertuduh ketiga berada di dalam rumah No 9.

[49] Selepas ditangkap, polis telah memeriksa badan beliau dan polis telah merampas serangkai anak kunci yang ada lambang 'Proton', passport beliau dan dua kad akses. Pihak polis turut memeriksa kereta Persona yang beliau pandu tetapi tidak menjumpai sebarang barang salah. Pihak polis yang diketuai oleh ASP Ikhwan Hilmi bin Ismail (SP17) kemudiannya telah membawa beliau ke rumah beliau di Sutramas Kondomminium untuk pemeriksaan tetapi tidak juga menjumpai sebarang barang salah.

[50] Beliau menafikan keterangan SP8 yang menyatakan beliau telah meniti atas bumbung ke rumah No 11. Pada masa itu beliau mengalami penyakit 'arthiritis gout' yang serius dan tidak berupaya untuk berjalan dengan baik dan tidak boleh untuk terjun dari atas bumbung. Pada hari itu beliau memakai seluar jeans dan baju berbunga berwarna biru dan bukan warna putih seperti didakwa oleh SP8. Beliau juga tidak mengalami sebarang kecederaan dan pakaian beliau juga tidak ada yang rosak.

[17] The learned judge also summarised the evidence of the second and third appellants. It was fashioned as follows:

[51] Tertuduh kedua (SD3) dalam keterangannya menyatakan seperti berikut. Beliau berasal dari Iran. Pernah datang ke Malaysia dalam bulan Disember 2011 dan pertengahan Januari 2012 dia datang semula ke Malaysia kali kedua sebelum ditangkap oleh polls. Beliau datang ke Malaysia sebagai pelancong dan telah menyediakan beberapa dokumen untuk memohon untuk mendapat perlindungan di bawah UNHCR atas cadangan kawannya yang bernama Hamidreza (SD5). Pada

11.2.2012 beliau berada di rumah Mehdi di No 9, Jalan Dutamas Melor 1, Cangkat Kiara Bayu Off Jalan Dutamas. Beliau mula mengenali Mehdi di 1001 Restauran & Club pada 10.2.2012 dan mereka telah minum bersama di situ. Oleh kerana SD5 tidak dapat menjemput beliau, Mehdi telah mempelawa beliau dan juga tertuduh ketiga untuk pergi ke rumahnya di No 9 tersebut Mereka telah mengikuti Mehdi yang memandu kereta Mercedes Benz balik ke rumah No 9. Setelah tiba di rumah Mehdi, mereka terus sambung sesi minum minuman keras sehingga mabuk dan tertidur. Mereka minum menggunakan jug yang serupa dalam gambar P110 (42). Semasa berada di rumah Mehdi beliau mendengar orang berjalan-jalan dan bercakap-cakap di tingkat atas.

[52] Beliau bangun jam 3.00 petang keesokkan hari (11.2.2012) dan beliau lihat terdapat banyak 'missed call' dari SD5. Beliau telah menalipon SD5 yang mengajak beliau makan malam di rumahnya. Beliau telah bersetuju. SD5 akan datang untuk mengambil beliau di 'guard house' dalam setengah jam. Sementara menunggu SD5, beliau telah bercukur menggunakan pisau cukur diberi oleh Mehdi. Beliau kemudian memakai pakaiannya semula dan pergi menunggu SD5 di 'guard house'. Dalam perjalanan ke sana beliau telah ditangkap oleh polis. Pihak polis telah memukulnya dan telah berlaku pergelutan sehingga beliau mendapat kecederaan di kaki. Beliau dibawa semula ke rumah Mehdi dan polis beritahu terdapat dadah dalam rumah itu.

[53] Tertuduh kedua menafikan ada pengetahuan terhadap dadah di rumah Mehdi. Beliau menafikan polis telah merampas passport beliau dalam rumah Mehdi. Beliau menafikan semasa ditangkap hanya memakai seluar pendek berwarna putih. Beliau juga menafikan dia salah seorang yang dilihat oleh SP8 meniti atas bumbung rumah No 9 menghala ke bumbung rumah No 11. Akhirnya tertuduh kedua menafikan beliau telah menandatangani senarai pemeriksaan (P113).

[54] Tertuduh ketiga (SD6) dalam keterangan bertulisnya menyatakan seperti berikut. Beliau datang dari Iran dan bekerja sebagai tukang gunting rambut. Beliau datang ke Malaysia atas ajakan sahabat karib beliau, tertuduh kedua. Tertuduh kedua beritahu rakannya Hamidreza tinggal di Malaysia. Beliau bersetuju untuk mengikut tertuduh kedua untuk bercuti di Malaysia. Mereka datang ke Malaysia pada 22.1.2012. Keterangan tertuduh ketiga seterusnya adalah seperti keterangan tertuduh kedua. Mereka telah pergi ke 1001 Nights Restaurant & Club bersama SD5 untuk makan malam. SD5 telah meninggalkan mereka di Kelab tersebut dan gagal untuk menjemput mereka. Oleh itu mereka telah mengikuti Mehdi balik ke rumah No 9. Di rumah Mehdi, mereka telah terus meminum minuman keras sehingga mabuk dan tertidur.

[55] Mereka terkejut pada petang keesokkan hari. Tertuduh ketiga kata beliau melihat kedatangan tertuduh pertama ke rumah No 9 untuk menghantar makanan. Sebelum keluar rumah, tertuduh ketiga ada menggunakan pisau cukur di dalam sebuah bilik mandi. Apabila beliau mahu keluar rumah, beliau telah ditangkap oleh pihak polis. Beliau mahu pergi ke Petaling Street untuk mencacah tattoo dibadan beliau. Akibat pergelutan dengan polis beliau telah mendapat kecederaan di bawah ketiak dan telah berdarah. Pada malam di rumah Mehdi, beliau juga ada mendengar suara ramai orang di tingkat atas. Beliau menafikan melarikan diri melalui bumbung rumah dan menafikan telah ditangkap di rumah No 11.

[18] At the conclusion of the trial, the learned judge, for reasons that appear in his judgment, rejected the accounts given by the appellants to show that they had no knowledge and possession of the drugs. He considered their version of the events to be farfetched and a mere denial. The learned judge found that the appellants had failed to rebut the statutory presumption as well as failed to raise a reasonable doubt in the case for the prosecution. The appellants were accordingly found guilty, convicted and sentenced to death.

THE INSTANT APPEALS

[19] Before us, although several grounds were listed in the petition of appeal, the one pivotal issue raised by all three appellants was the question of possession and knowledge of the impugned drugs. All the three appellants denied knowledge and possession and their criticism of the learned judge's finding is that there had been no proper appreciation, or misappreciation of the defence of each appellant. In this context, it is settled law that in order to prove possession, the element of custody and control and knowledge must be established (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237).

[20] Dealing first with the case of the first appellant, the learned judge decided that the first appellant had custody and control based on two factors. Firstly, the learned judge reasoned that the first appellant had custody and control of the impugned drugs because he was seen 'meniti bumbung rumah No 9', evidence the learned judge rendered admissible by virtue of s 8 of the Evidence Act 1950, thereby proving that the first appellant had knowledge of the impugned drugs (see paras 33, 36 and 66 of the grounds of judgment).

[21] Secondly, the learned judge reasoned that the first appellant 'sering datang dan pergi serta berada di rumah No 9 untuk tempoh yang agak panjang menunjukkan tertuduh pertama mempunyai jagaan dan kawalan bersama serta mempunyai akses terhadap rumah No 9 dan barang kes dadah yang berada di dalam rumah tersebut' (see paras 38 and 63 of the grounds of judgment).

[22] It cannot be denied that the learned judge's finding that the first appellant was seen escaping house No 9 was based entirely on SP8's testimony. However, SP8 had never identified and could not identify any of the appellants as being the same persons escaping from the roof of house No 9. Even so, the first appellant was arrested soon after the police raid took place and was found close to the scene.

[23] On the second observation, the learned judge concluded that custody and control had been established on the basis that the first appellant had gone in or out of house No 9 and stayed for prolonged periods of time. This finding,

we agree, was not supported by the evidence. There was no positive evidence linking the first appellant to the persons seen entering the house during the period of surveillance from 6–10 February 2012. None of the witnesses ever testified that it was the first appellant who was seen in the Proton Persona. The first appellant testified that he had been to the said house before to deliver food but during that surveillance period between the 6th to the 11th, he went there only once on the 11th itself when he was apprehended.

[24] When considering the defence of the first appellant, the learned judge rejected his evidence that he went to house No 9 to deliver food. This finding was predicated on the reasoning that 'sekiranya benar tertuduh pertama hanya menghantar makanan, dia tidak perlu berada di dalam rumah itu untuk tempoh berjam-jam lamanya' (see para 63 of grounds of judgment). The learned judge added 'tiada sebarang makanan ditemui dalam rumah No 9 atau dalam kereta Proton Persona'.

[25] In this respect, we agree that the first reasoning was flawed as it was based on the wrong assumption that the first appellant was the same person observed from 6–11 February 2012. As for the second reasoning, it was not supported by the evidence in that SP8 and his team did not look for any food at the time. This was understandable as their focus would be on looking for the impugned drugs. This evidence of delivery of food was in fact agreed to by SP21 as the first appellant had mentioned this in his police statement. This was further supported by the evidence of SD2 and SD5 who told the court that the first appellant worked at 1001 Nights restaurant as a delivery man which was never disputed by the prosecution.

[26] As it turned out, the only evidence against the first appellant with regard to his presence in house No 9 was that the first appellant drove the same Proton Persona to house No 9 at around 4.52pm and eight minutes later the raid took place where the first appellant was apprehended. So the first appellant could only have been in the said house for a few minutes. This by itself was insufficient to establish custody and control and therefore possession. The mere presence of the first appellant at the scene for few minutes or even proximity to the drugs admits to more than the inference suggested by the prosecution in that he could also have no knowledge or custody or control of the impugned drugs (see *Asdanusi Daut & Anor v Public Prosecution* [2004] 3 CLJ 669). So in all probability, he could have been at the scene, as he says, merely to deliver food and was not in possession of any drugs.

[27] Now, the only plausible evidence left against the first appellant was that he together with the second and third appellants attempted to flee from the said premises in order to escape from the police. On this score, the first appellant

could have provided a resonable explanation as to why he attempted to run away. It is only logical that the evidence of fleeing does not admit to only one inference (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705). However, his position was that he did not run away and that the police had arrested him in the compound of house No 9. This version was, however, not accepted by the learned judge and we see no reason to differ. The version of the prosecution that the first appellant was apprehended not at house No 9 but at house No 11 was supported by the police prosecution witnesses.

[28] Even so, at best, and in the absence of any reasonable explanation, the evidence of fleeing may only indicate knowledge of the impugned drugs. It is trite, however, that mere knowledge alone without proof of physical custody or control is insufficient in law to constitute possession, much less trafficking (see *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] Supp MLJ 280; [2011] 4 CLJ 113).

[29] This is because, factually, a person may have knowledge of the incriminating drugs but it is also possible for him or her at the same time not to have custody or control of the same in the sense that some other person may have the power of disposal of the drugs. That person with knowledge cannot then in law be said to be in possession of the said drugs. As we had found earlier, there was patently insufficient evidence of custody or control and therefore possession.

[30] Furthermore, there was also the important fact that despite extensive scientific investigations at house No 9, no DNA evidence or fingerprints of the first appellant was found at the scene of the crime. There was also no evidence whatsoever that he resided at house No 9. In fact, the evidence showed otherwise in that the first appellant carried his passport with him and he had an access card for another premises at Sutramas Condominium which he claimed was his place of residence. These circumstances only lend credence to his version of the events. In the end, the element of possession, in our judgment, remained unproven beyond a reasonable doubt. As such, we found the conviction of the first appellant to be wholly unsafe.

[31] Coming now to the case of the second and third appellants, it was also their contention that knowledge and possession of the drugs stated in the charge had not been proven and that the learned trial judge had failed to adequately evaluate the defence case.

[32] Both the second and third appellants had a similar story. On 10 February 2012, they had been drinking together with one Mehdi at the 1001 Restaurant & Club. Given that SD5 could not fetch the second

appellant, Mehdi had invited both of them to his house which was the same house No 9 where the drugs in question were found. A

[33] It was their evidence that Mehdi drove both of them to the said house in a Mercedes Benz car and, upon arriving at the said house, they continued drinking from a jug until they got drunk and fell asleep. The second appellant woke up at 3pm the next day. He used a shaver provided to him by Mehdi and then proceeed to the guardhouse to wait for SD5. On the way to the guardhouse he was apprehended by the police who had beaten him after a scuffle. He was then brought to the said house. He denied having knowledge of the impugned drugs. The third appellant denied he had attempted to flee and challenged the prosecution's narrative as to how and where he was apprehended. B C

[34] In connection with their contention that it was Mehdi who brought them to the said house, the learned judge found it most improbable. This is how the learned judge assessed the evidence: D

> [64] Saya juga sukar untuk menerima pembelaan tertuduh-tertuduh mengenai kewujudan penama Mehdi yang dikatakan sebagai orang yang mendiami rumah No 9. Nama Mehdi hanya ditimbulkan semasa perbicaraan diadakan dan tidak pernah ditimbulkan semasa tangkapan dan juga semasa siasatan dijalankan. Saksi SP8 tidak ada menjumpai dan menangkap penama Mehdi atau lain-lain orang yang didakwa berada dalam rumah No 9 tersebut. Malahan semasa pemerhatian dilakukan antara 6.2.2012 sehingga masa serbuan pada 11.2.2012, pihak polis tidak pernah melihat sama ada kereta Ferrari mahupun kereta Mercedes Benz yang didakwa milik Mehdi ada datang ke rumah No 9. Dalam tempoh yang sama, saksi-saksi pendakwaan hanya melihat kereta Persona tersebut sahaja yang keluar dan masuk ke rumah No 9 tersebut. E F
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> [65] Jika benar keterangan tertuduh-tertuduh bahawa Mehdi wujud, mereka sewajarnya memberikan butir-butir yang lebih jelas dan terperinci tentang penama itu supaya satu siasatan lengkap dan sempurna dapat dijalankan oleh SP21. Saya mendapati tertuduh-tertuduh gagal untuk mengemukakan 'Notis *Alcontara*' yang efektif dan sempurna dalam kes ini. Tertuduh-tertuduh tidak boleh menyalahkan pihak pendakwaan dalam kegagalan membuat penyiasatan dan membawa Mehdi sebagai saksi untuk membantu versi pihak pembelaan. Saya juga mendapati penama Mehdi, jika wujud sekalipun tiada sebarang kaitan dengan dadah-dadah yang dipertuduhkan. G H

[35] After anxious consideration, we do not see how there was any error in the learned judge's assessment of the evidence. There was no such Mercedes car seen by the surveillance team and there was no person by the name of Mehdi found at the said house when the police raided it. In fact, the surveillance team saw nothing of what was alleged by the second and third appellants. This I

character Mehdi may exist but he was never mentioned by the appellants before the trial. In our view, the learned judge was entitled to come to the finding as he did.

[36] We did not think the learned judge was in error when he found both of them to be in possession of the impugned drugs from the direct evidence that was adduced by the prosecution. It was certainly a fair inference that they must have had knowledge of the drugs when they fled from the house to evade arrest. Since they contended that they did not flee, which was contrary to the evidence of the police prosecution witnesses, there could not have been any explanation forthcoming from both of them as to why they fled from the crime scene.

[37] What was most damning, in our view, was the fingerprint evidence. SP22 and her team had lifted fingerprints from six 'bikar kaca' which were found at room No 3 on the fourth floor of the said house. SP18 testified that both their fingerprints were found in at least five out of the same six 'bikar kaca' and not all six as the learned judge observed. As confirmed by the analysis conducted by SP3, the DNA profile of both the second and third appellants was found on the two shavers that were recovered from a bathroom located in room No 3 on the fourth floor of the said house. The scientific evidence confirmed that they had been, at the very least, up to the fourth floor of the said house.

[38] Now, although it was established that they did not own the said house or were tenants occupying it under any tenancy agreement, they were certainly the only ones found in the said house although they attempted to flee before being apprehended. Their claim of the house belonging to Mehdi, and perhaps suggesting that the drugs belonged to him, was discredited.

[39] We had noted that there was much confusion as to who had tenanted the house. It turned out that the tenancy agreement was fictitious. Clearly, someone had gone to great lengths to hide the actual tenancy. This however did not detract from the evidence that at the time of arrest, the second and third appellants were the only persons in control of the premises. Apart from the presence of Mehdi asserted by them, no other possibility was raised as to how they came to be the only ones at the house.

[40] In our view, when compared to the rest of the evidence, the version asserted by the second and third raised serious troubling questions. For example, as we noted earlier, how did the second and third appellants come to be the only occupants of the said house? If they were not involved, why would anyone leave them alone at a house in which there was a fairly sophisticated drug laboratory with much equipment and a large amount of drugs with a high street value? They could not possibly have been there by some unfortunate

circumstance or extreme bad luck, as they seem to assert, unless someone was trying to frame them for the drugs found. A

[41] Even then, the second and third appellants did not say they were framed by anyone. They only mentioned the name of Mehdi, suggesting somewhat indirectly that he was perhaps the culprit. Even if they thought that Mehdi was the cause of their predicament, and it was fair that they should according to their own evidence, why only mention Mehdi during the trial and not before. Why did they not mention this to the police when arrested or even later? B

C

[42] Assuming for a moment that their version of the role played by Mehdi was true and that he had brought them to the said house, then where did he go? The surveillance team never saw him. The police raiding party did not find him there at the scene. But according to the version of the second and third appellants, Mehdi was there in the morning when they woke up as he was the one who provided the shavers to them. If he did manage to escape from the raiding party or had even left the said house earlier before the raid without anyone noticing him, then surely the second and third appellants would have been angry as it would be Mehdi who would be responsible for putting them in this mess. D E

[43] If they were indeed innocent as they claimed, they would have told the police about Mehdi at the first opportunity, unless of course they, together with Mehdi, were all involved with the illicit drugs. It is common sense that even if Mehdi was somehow connected to the illicit drugs found at the said house, it does not follow that the second and third appellants were not involved. In short, they could all be involved. F

[44] Considering the entirety of the evidence, the irresistible inference is that the second and third appellants were culpable and their explanation for their innocent presence at the scene of the crime was rather farfetched and highly improbable as the learned judge had found. Even if Mehdi was a real figure, the version presented by the second and third appellants could not have raised any reasonable doubt on the case by the prosecution. G H

[45] In our view, considering all the facts and circumstances of this case, and accepting the credibility of prosecution witnesses, the learned judge was correct in drawing the inference that the second and third appellants knew that the chemical substance found in the house were illicit drugs. We agree that based on the evidence of the prosecution, the essential elements of custody and control and knowledge had been proven such that taken together, there was no doubt in our minds that actual possession had been established. I

[46] We have not overlooked the fact that this was not the usual type of trafficking as it involved the manufacturing of drugs. The discovery of the various apparatus and laboratory equipment and the chemical substances in the house coupled with the chemist's evidence as to the uses and functions of those apparatus and the substances found lend much credence to the proposition of the prosecution that the said house was used as a clandestine drug laboratory.

[47] The overwhelming inference is that the second and third appellants could not have no knowledge of what was transpiring in the said house given the evidence that was adduced against them. As alluded to earlier, the fingerprint and DNA evidence placed them up to the fourth floor of the said house where the incriminating drugs were found by the police party.

[48] Now, the third appellant, through his counsel, raised the issue of the admissibility of the DNA evidence. Learned counsel's criticism was fashioned as follows. Under s 12 of the Deoxyribonucleic Acid (DNA) Identification Act 2009 ('the DNA Act 2009'), a blood sample, as an intimate sample, is to be taken by an authorised officer with the rank not below Deputy Superintendent of Police ('DSP'). In the present case, it was SP21 who had authorised for the blood specimen to be taken and he did not hold the rank of DSP. It was submitted that the DNA report was inadmissible as the conditions stated in s 12 of the DNA Act 2009 were not complied with.

[49] In this regard, we were more persuaded with the learned DPP's submission that the provisions in ss 12 and 13 of the DNA Act 2009 are procedural and not related to the issue of admissibility of such evidence. It is trite law that the court will admit evidence if it is relevant and reliable. Even blood samples taken illegally from suspects or accused persons without their consent have been held to be admissible (see *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; see also *Kuruma, Son of Kaniu v The Queen* [1955] AC 197; *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33). In the circumstances, we do not think the learned judge was wrong in admitting the DNA evidence.

CONCLUSION

[50] In the circumstances, and for the reasons we have given, and especially having regard to our reservations as expressed aforesaid, we found the conviction of the first appellant to be wholly unsafe. There was certainly a serious doubt as to his guilt such that it could not be said with any conviction that the prosecution had proven the charge against him beyond reasonable

doubt. Accordingly, the appeal of the first appellant is allowed. An order for acquittal and discharge was entered and the conviction and sentence ordered by the High Court was set aside.

[51] With respect to the second and third appellants, having scrutinised the whole of the evidence, we found their convictions to be safe. As such, their convictions on the charge and the sentences imposed were affirmed.

Appeal of the first appellant allowed, appeal of the second and third appellants dismissed.

Reported by Izzat Fauzan